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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 535

CONTINENTAL CAN COMPANY, INC.
Petitioner,

v.

GERALD A. DONAHUE,
Tax Commissioner of the State of Ohio, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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September 7, 1966

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Continental Can Company, Inc., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio in the above-entitled case.[1]

Opinions Below

The opinion of the Supreme Court of Ohio is reported at 5 Ohio St. 2d 224, 215 N.E. 2d 400 (1966) and is

1. In addition to the Tax Commissioner of Ohio, the following Ohio county auditors are named as respondents: George A. Smith, Ashtabula County; Vernon E. Doenges, Auglaize County; Arthur R. Tilton, Butler County; Kenneth Bell, Columbiana County; Ralph J. Perk, Cuyahoga County; Norma Fae Knick, Darke County; Gerald G. Schweinfurth, Erie County; Arch Warren, Franklin County; Fred J. Morr, Hamilton County; Carroll R. Shanks, Hancock County;

reprinted as Appendix A, *infra,* p. 26. The orders of the Supreme Court of Ohio are reprinted as Appendices B and B-1, *infra,* pages 32 and 33. The decision of the Board of Tax Appeals, which incorporates in full the administrative determination by the Ohio Tax Commissioner, is unreported and is reprinted as Appendix C, *infra,* p. 34.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on March 16, 1966. A timely Petition for Rehearing was denied April 13, 1966. On June 23, 1966, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including September 10, 1966. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

Questions Presented

1. Should not this Court require the State courts to provide adequate legal remedies to insure that tax assessors accord equal protection to the owners of property being assessed and taxed under the laws which govern these tax assessors?

2. Where the Ohio Legislature has required Ohio taxing authorities to use the same standard for assessment of

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Ben H. Young, Henry County; Vera S. Weil, Homes County; Glenn Hess, Knox County; Aurel E. Coffman, Licking County; William C. Galvin, Lucas County; Mary E. Furnis, Marion County; H. Burke Woodward, Medina County; Tom Timmerman, Mercer County; Jesse Haines, Montgomery County; Don Dilts, Muskingum County; Melvin C. Guth, Ottawa County; Harold E. Hoffman, Putnam County; Elton Lahr, Sandusky County; William C. Trimbur, Trumbull County; Donald Myers, Van Wert County; Glenn L. Newland, Wayne County; Lester Lougheed, Williams County; Kenneth S. Slaughterbeck, Wood County.

both real and tangible personal property—"true value in money"—does the State of Ohio deprive petitioner, an owner of tangible personal property, of equal protection of the laws by administratively denying petitioner the same reduction from "true value in money" for assessment of its tangible personal property[2] as the State grants to owners of real property?

Constitutional Provision and Statutes Involved

This case involves Article XIV, Section 1 of the Constitution of the United States and Sections 5711.22 and 5713.01 of the Ohio Revised Code as the latter existed during the 1963 tax year. This Constitutional provision and these statutes are set out in full in Appendix D, at page 52, *infra.*

Statement

Throughout the history of the United States, the ever increasing needs on the part of States and other political subdivisions for revenue raised by taxation has caused problems in the fair application of tax laws. This Court has over the years exercised its jurisdiction to assure that the equal protection provisions of the United States Constitution would be heeded by those charged with the duty of collecting taxes. The need for revenues, however, generates such pressures that periodic reviews are necessary to prevent the growth and continuation of improper practices. Since the last case of the series dealing with this subject, *Hillsborough* v. *Cromwell,* 326 U. S. 620, decided

2. As hereafter used in this petition the term "personal property" means tangible personal property as defined in Section 5701.03 of the Ohio Revised Code. The taxation of intangible personal property is not involved in any way.

in 1946, new problems in this area have resulted from new economic developments and old problems have recurred in new forms. The present case indicates the need for a reexamination of the principles involved and a restatement of the Constitutional requirements.

This case involves the arbitrary and discriminatory administration of Ohio tax laws. It arises because of the systematic assessment of Ohio real property at only a fraction of its "true value in money" contrary to the express requirements of Ohio law (Ohio Revised Code § 5713.01) and the refusal by the Ohio authorities to apply the same reduction in the assessment of personal property notwithstanding the requirements of Ohio laws that the same standard be used. Under the pertinent laws, real property is required to be assessed at its true value in money; personal property at 70% or 50% of its true value in money. In practice, and without legislative sanction of any kind, real property is assessed at about 40% of its true value while personal property is assessed at 100%, to which the 70% or 50% formula is applied.

As indicated, the laws of the State of Ohio provide the same basis for assessing real and personal property for the purpose of taxation. Whether the Legislature of Ohio might have classified the property and prescribed different standards of valuation is not an issue in this case. The Legislature has not done so.[3]

The effect of the administrative favoritism of the Ohio taxing authorities is threefold:

> First: Owners of personal property do not receive the benefit of the reduction from the "true value in money" which is given to owners of real

3. There have been changes in the Ohio statutes affecting years subsequent to the year here in issue. They have no bearing on the tax which is the subject of this litigation. See note 33, *infra*, p. 22.

property despite the Legislature's determination that the basic standard of valuation shall be the same in both instances;

Second: The intention of the Legislature to tax personal property at a *lower* rate than real property by the application of a percentage formula to the assessed value is completely thwarted; and

Third: The owners of personal property are required to assume a larger share of the tax burden than that prescribed by the Legislature.

Even though the Ohio taxing authorities did not assess petitioner's personal property at *more* than its "true value in money", petitioner's standing to complain of the discriminatory treatment is clear. *Cumberland Coal Company* v. *Board of Review,* 284 U. S. 23, 28-29 (1931) and cases cited therein.

The facts in this case are not in dispute. Petitioner owned tangible personal property located within the State of Ohio which was determined by Ohio taxing authorities to have a "true value in money" for the 1963 tax year of $21,702,516. The accuracy of this figure is not disputed (R. 82).[4] Thus petitioner's tangible personal property tax was computed using $21,702,516 as the base figure.

Although the Ohio statute relating to assessment of real property for tax purposes also required that real property be assessed at its "true value in money" (Ohio Revised Code §5713.01), there has been a systematic administrative practice in all Ohio counties of assessing real property at a percentage of its true market value—approximately 40%. Petitioner's undisputed evidence as to these facts was taken directly from Sales Ratio Studies prepared by the Ohio Board of Tax Appeals—

4. Record references are to Record printed for use in the Supreme Court of Ohio and filed with this petition.

Division of County Affairs which has the responsibility for uniformity in assessment of real property. The testimony of the Chief of the Division of County Affairs (R. 22-55) as to the systematic undervaluation of real property was not contradicted or questioned by the State. Neither did the Board of Tax Appeals or the Supreme Court of Ohio question the accuracy of petitioner's factual contentions (Appendices A and C, *infra,* pages 30 and 45). The notoriety of this practice in Ohio is further evidenced by the recent decision of the Ohio Supreme Court in *Park Investment Co.* v. *Board of Tax Appeals,* 175 Ohio St. 410, 195 N.E. 2d 908 (1964), in which the Ohio Court acknowledged the practice of systematic undervaluation of real property. The mandate of the Board of Tax Appeals in *Park Investment Co.,* which is part of the record in this case (Exhibit 6, R. 74-80), specifically finds systematic undervaluation on a statewide basis (R. 78, paragraphs 6 and 7).

Since the Ohio Legislature intended both types of property to be assessed according to the same basic standard—true value in money[5]—and since owners of real property were realizing the benefit of an administrative reduction in their tax assessment, petitioner sought equalization by claiming a deduction to reduce the true value of its personal property to a figure equivalent to 40% of its true value (R. 1-3). This claim was denied by the Ohio Tax Commissioner and the Ohio Board of Tax Appeals (Appendix C, *infra,* p. 51). This exhausted petitioner's administrative remedies and appeal was taken to the Supreme Court of Ohio which affirmed the decision of the Board.

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5. In his brief before the Supreme Court of Ohio, the Attorney General of Ohio admitted: ". . . we may agree that true value in money means the same thing, in each place where it appears." Brief for Tax Commissioner, p. 19.

Presence and Preservation of the Constitutional Question in Proceedings Below

Petitioner specifically raised the Constitutional question of denial of equal protection of the law in its initial Claim for Deduction from Net Book Value to True Value made to the Department of Taxation, State of Ohio:

> Therefore, the assessment of personal property on the basis of net book value for the purpose of ad valorem taxation results in unfair and unjust discrimination, denying the owner thereof equal protection of the law in violation of the guarantees contained in the Fourteenth Amendment to the Constitution of the United States . . . (R. 2).

The Tax Commissioner mistakenly concluded that the constitutionality of legislation was in issue and declined to pass upon petitioner's claim (Appendix C, *infra*, p. 36).

Petitioner specifically preserved its claim of Constitutional violation in its Notice of Appeal to the Board of Tax Appeals of Ohio:

> (3) Appellant's tangible personal property has been assessed according to said practice, which is contrary to Ohio statutory mandates and which violates the Fourteenth Amendment of the Constitution of the United States . . . (R. 16).

As the opinion of the Supreme Court of Ohio indicates, Federal Constitutional objections were raised by petitioner in that Court:

> Appellant contends that because it has become customary, on the part of county auditors in Ohio, to assess real property at a percentage of its true

> value in money, whereas appellant's tangible personal property was valued by the Tax Commissioner at its full true value in money, the appellant has been denied its constitutional right of equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. (Appendix A, *infra*, p. 28.)

This basic constitutional question was summarily dismissed by the Supreme Court of Ohio with the statement that petitioner's Constitutional rights had not been violated because all other owners of taxable personal property are treated the same. Thus that Court completely failed to deal with the fact that the same legislative standard was applied, administratively and without sanction of law, in one way to real property and in another to personal property, to the great detriment of owners of the latter type of property.

Reasons for Granting the Writ

I.

This Court should continue its surveillance of local taxing practices to insure compliance with the Federal Constitution.

Revenue from taxation of property, real and personal, is the most important source of funds used to finance local governments.[6]

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6. Advisory Commission on Intergovernmental Relations, *Tax Overlapping in the United States 1964*, p. ii (July, 1964); Bird, *The General Property Tax: Findings of the 1957 Census of Governments*, 6 (Pub. Admin. Serv. 1960). According to the House Committee on Government Operations, $7 out of every $8 in local tax revenues come from taxes on property. *Thirtieth Report by the Committee on Government Operations*, H.R. Rep. No. 1643, 89th Cong., 2d Sess. 17 (1966).

The total amount of revenue resulting from such taxes exceeded $20 billion in 1963, the year involved in this proceeding. The most difficult problem of property taxation has been from the beginning and continues to be how to assess property on an equitable basis. A property tax which "lies at the very heart of independent and responsible self government at the local level and is peculiarly suited to the needs of local government" [7] must be safeguarded by assessment administration that treats all taxpayers fairly and without discrimination.

Shortly after the adoption of the Fourteenth Amendment this Court assumed the ultimate responsibility for ensuring that the State and inferior federal courts enforce the mandate of equal protection of the laws in cases involving discrimination by State and local taxing authorities through the abuse of the assessment process.[8] The most recent of this line of cases was the 1946 decision in the *Hillsborough*[9] case in which Mr. Justice Douglas reiterated that:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment." [10]

Since 1946, increases in the costs of providing local government services, shifts of population from within to without the boundaries of incorporated municipalities, and increased services demanded from local governments have

7. Bird, *id.* at 26.
8. *Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U. S. 232 (1890)
9. *Hillsborough* v. *Cromwell,* 326 U. S. 620 (1946).
10. *id.* at 623.

all brought increased pressure for additional revenues. For political reasons new taxes are avoided. So are increases in the rates of existing taxes. This puts pressure on the tax base and has caused distortion in the assessment practices.

Most States have by their constitution or statutes a requirement that all taxable property be assessed for taxation at its full value.[11] Nevertheless, the almost universal rule is that property, particularly real property, is in fact assessed at a fraction of its value.[12] This practice of underassessment creates and facilitates discrimination between taxpayers in their proportionate share of the tax burden. Unequal underassessments are hard to detect, less likely to be the subject of complaint and not likely to incur judicial condemnation.

This diserimination results in owners of some property bearing a disproportionately large portion, and owners of other property bearing a disproportionately small portion of the tax burden despite Constitutional and statutory mandates to the contrary. It distorts the financial position of the taxing municipalities and has many other undesirable effects.[13]

Insuring equality of assessment of his tangible personal property presents an even more difficult problem for the taxpayer. Even the United States Census Bureau's 1957 Census of Governments does not produce statistics as to the degree of undervaluation of personal property to

11. The phraseology of these provisions differs but the import seems the same. Note, *Tax Assessments of Real Property: A Proposal for Legislative Reform,* 68 Yale L.J. 335, Appendix following p. 386 (1958).

12. Advisory Commission on Intergovernmental Relations, *op. cit. supra,* note 6, at p. 83; Bird, *op. cit. supra,* note 6, at pp. 38-50.

13. Bird, *op. cit. supra,* note 6, at pp. 31-35; Schmidt, *Categorical Inequalities in Assessment in Nebraska,* 5 Nat'l Tax J. 130, 140-43 (1952).

which taxpayers can refer.[14] A taxpayer faced with a statute calling for him to return his property to the assessor at "full value" might understandably be tempted to follow the warning of one knowledgeable expert in the field:

> "The taxpayer or his counsel who makes a good faith return, abiding by the text of the law, in connection with the listing of his personal property, such as merchandise, inventories or moneys and credits, will discover upon later inquiry, more often than not, that he has penalized himself by his honesty."[15]

This cynical advice, too, results from the exercise by assessors of a free hand in determining the degree to which they will follow the statutory command to assess property at full value.

The determination of the relative burdens to be borne by the different segments of the public is a legislative function, but the assessors have arrogated it to themselves. Obviously an increase in the assessed value of a particular taxpayer's (or group of taxpayers') property is every bit as effective as an increase in the tax rate so far as that taxpayer's (or group's) burden is concerned. Such increases, if carefully delineated, can be made at the risk of only a minimum of political pressure.[16] This case presents a clear instance of the assessing authorities, contrary to

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14. "Taxable personal property, because of its elusive and variable position in the nation's property tax base, did not lend itself to such evaluation . . . ." Bird, *op. cit. supra,* note 6, at p. 38.

15. Cook, *State Taxation: Assessment and Levies,* The Tax Magazine 547, 548 (July, 1953). See also Advisory Commission on Intergovernmental Relations, *op. cit. supra,* note 6, at p. 83 (Vast amounts of personal property escape taxation).

16. In that regard, it is important to note that in Ohio, real property is assessed by locally elected auditors in each county. In

legislative command,[17] shifting the burden of taxes to the owners of tangible personal property and away from the owners of real property who often constitute a much more potent political force.

In most States ". . . the weakest spot in the whole property tax structure . . ." is the machinery of protest and appeal available to the individual taxpayer.[18] The Commission on Intergovernmental Relations summarized the taxpayer's position to require redress against a discriminatory property tax assessment as follows:

> "The taxpayer's first line of defense against inequitable assessment is the competent organization and procedure for good quality primary assessment, but he is entitled to effective remedies when he has a grievance. The State tax laws specify that assessment shall be uniform, at least within classes of property, and under the equal protection clause of the Fourteenth Amendment the taxpayer is entitled to fair treatment in the apportionment of the tax burden; but in most States the review and appeal procedures give him inadequate protection.
>
> "In many States the statutory hierarchy of administrative and judicial review and appeal

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contrast, most personalty is assessed by the Tax Commissioner, an appointive official with statewide powers. The shortcomings of the Ohio system of assessing real property in comparison to personal property was specifically noted in the report of the Advisory Commission on Intergovernmental Relations, *The Role of The States in Strengthening the Property Tax*, Vol. 2, p. 127 (June, 1963):

> "In sharp contrast to Ohio's strong program for the central assessment of personal property is the State's rather perfunctory concern for the assessment of real property."

17. Bowers, *Report to Ohio Manufacturers' Association Board of Trustees* (June 1, 1966), reprinted in full as Appendix E, *infra*, p. 59.

18. National Tax Association, Report of Committee on State Equalization of Local Property Taxes, p. 20 (1958).

> agencies for the protection of the property taxpayers is elaborate; but actual protection under the various systems is illusory because, first, the tribunals to which the taxpayer must appeal are not well constituted and staffed for the purpose, and second, the burden of proving his case is too onerous and costly. . . ."[19]

The courts of the several States have until very recently afforded very little, if any, redress for the taxpayer, and the redress remains inadequate.[20] In at least one State, despite this Court's decision in *Hillsborough*, the taxpayer's sole redress is an action to increase the assessment of the favored taxpayers.[21] Many State courts continue to impose severe technical and procedural burdens on the taxpayer seeking to have his property assessed on the same basis as that of a more favored owner or group of owners.[22] In addition, the burden of proof required to prove inequality and the expense of producing the evidence necessary to meet that burden have made resort to the court a cumbersome, unsatisfactory and often illusory remedy.[23]

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19. Advisory Commission on Intergovernmental Relations, *op. cit. supra*, note 6, at p. 91.

20. See Note, *Inequality of Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374 (1962).

21. *Dade County* v. *Salter*, So. 2d , CCH Florida State Tax Reporter ¶200-736 (Fla. Sup. Ct., May 11, 1966). See also *Rollman & Sons Co.* v. *Board of Revision*, 163 Ohio St. 363, 127 N.E. 2d 1 (1955), referred to in note 27, *infra*, p. 15.

22. Note, *Inequality of Property Tax Assessment, op. cit. supra*, note 20, at pp. 1380-1382. See also, Holbrook and O'Neil, *California Property Tax: Proposed Means of Return to Democratic Principles*, 27 So. Cal. L. Rev. 415 (1954). See cases cited in note 26, *infra*, p. 14.

23. Note, *Tax Assessments of Real Property, op. cit. supra*, note 11, at pp. 347-48.

Ironically, a decision of this Court seems to recognize and give tacit approval to fictions and subterfuges by which the assessment process can be distorted.[24] By encouraging the tax assessor to disregard the legislative determinations, decisions of this type contribute to the debasement of the assessment process.

The courts in some States have recognized the need for legal redress against the extra-legal assumption of power on the part of the tax assessors.[25] The courts of other jurisdictions have not done so. Some have continued to adhere to decisions imposing difficult procedural or evidentiary burdens on the taxpayers.[26] Others, such as the

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24. *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 369 (1940):

> "And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor."

This opinion was written by a distinguished and much respected jurist, but, we submit, the apparent blessing of phoniness in law administration is, to say the least, unfortunate. The reference to fictions brings to mind the story of a negro who applied for a literacy test in a State which required such a test as a qualification to registration to vote. He was handed a Chinese newspaper and asked if he understood it. "Yes, sir", he replied, "I understand it to mean that I am not to be allowed to vote".

25. See, *e.g., Shoppers' World Inc.* v. *Board of Assessors,* 348 Mass. 366, 203 N.E. 2d 811 (1965); *Hamm* v. *State,* 255 Minn. 64, 95 N.W. 2d 649 (1959); Appeal of Kents 2124 Atlantic Ave., Inc., 34 N.J. 21, 166 A. 2d 763 (1961); *In re Brooks Building,* 391 Pa. 94, 137 A. 2d 273 (1958).

26. *Le Dioyt* v. *County of Keith,* 161 Neb. 615, 74 N.W. 2d 455 (1956); *People* v. *Kinnaw,* 276 App. Div. 722, 97 N.Y.S. 2d 511 (1950); *Virtue Bros.* v. *County of Los Angeles,* 48 Cal. Rptr. 505 (Dist. Ct. of App. 1966); *Southern California Tel. Co.* v. *Los Angeles County,* 45 Cal. App. 2d 111, 113 P. 2d 773 (1941).

Supreme Court of Ohio in this case, have simply shrugged off the problem without trying to answer the taxpayer's complaints.[27]

Meanwhile, the increased demands for revenue for local governments have correspondingly increased the economic significance of the impact which discriminatory assessment practices have on individual taxpayers and groups of taxpayers. Some taxpayers, finding themselves without adequate legal remedies against the assessor's actions, have endeavored to influence that action to their benefit. As a result, assessors have been subjected to political and economic pressures for favorable tax treatment for particular individuals and groups.[28] In its most reprehensible form, the efforts to influence assessors have led to out-

27. See page 8 of this petition. It may be that the Supreme Court of Ohio still clings to the rule repudiated in *Hillsborough*—that an opportunity to get the more favored taxpayer's assessment increased is all that Equal Protection requires. "The sole question before the Board of Tax Appeals on appeal from the Board of Revision was whether the property in issue is valued at its true value in money . . . The fact that others may have property which is valued at less than its true value in money is not a denial of equal protection to the appellant because of the rights available to it under §5609, General Code, which provides for filing a complaint as to under-valuation of the property of others and therefore is not an issue which may be raised by appellant in this case." *Rollman & Sons Co.* v. *Board of Revision,* 163 Ohio St. 363, 127 N.E. 2d 1, 4 (1955).

See Note, *Inequality of Property Tax Assessment, op. cit. supra,* note 20, at p. 1376 where the *Rollman* case is characterized as a "startling exception" to the post-*Hillsborough* decisions which have recognized the unconstitutionality of discrimination in assessment among members of the same class and permitted the affected taxpayer to obtain a corresponding reduction. We submit that the present decision is no less startling in its failure to recognize and follow the mandate of *Hillsborough.*

28. Note, *Tax Assessments of Real Property, op. cit. supra,* note 11, at pp. 344, 358, 371.

right bribery in an attempt to better the position of one taxpayer vis-a-vis other taxpayers.[29]

Experience has taught that however pressing the need for reform, whether in the areas of racial discrimination, unequal representation or taxation, the obstacles to voluntary action at the local level are often overwhelming. Studies, analyses and reports such as those prepared by the Advisory Committee on Intergovernmental Relations are informative and even eye-opening but they are not self-executing.

It is necessary for this Court to continue to assert its mandate to the State courts. It is time for this Court to repudiate the notion that through fictions and beneath "a formal veneer of uniformity" local tax assessors can arbitrarily determine the burdens of taxation to be borne by different taxpayers or different kinds of property, regardless of the legislative commandments under which they operate, and enjoy immunity from judicial redress. This situation is comparable to and demands the same approach to the real issues as Mr. Justice Clark articulated in *Baker* v. *Carr*, 369 U. S. 186 (1962), concurring at page 262, when discussing the rights guaranteed by the Fourteenth Amendment:

> "National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges."

This case presents a proper vehicle for this Court to act. It presents a clear case of unequal treatment of members who by the express terms of the Ohio statutes

29. San Francisco Examiner, July 24, 1965, p. 1, col. 5, July 29, 1965, p. 1, col. 3, September 8, 1965, p. 1, col. 6; Wall Street Journal, September 21, 1965, p. 3, col. 6; Newsweek, July 11, 1966, p. 96. See also Phelan, *California Tax Scandal*, Saturday Evening Post, September 10, 1966, p. 23. The "can company" referred to in the latter article is not the petitioner herein.

are of the same class for assessment purposes. The unequal treatment has been solely the product of action of the assessors. A former Commissioner of Taxation of Ohio openly acknowledges that this has resulted in a reversal of the legislative policy.[30]

The issue here is straightforward and simple. There is no difficult question of statutory interpretation. The facts are not in dispute and the unequality is clearly established by the State's own records. The effect of a review by this Court and a decision on the merits would far transcend the boundaries of Ohio. The reassertion by this Court that it will not tolerate avoidance or evasion by lower courts of their obligation to require assessors to apply the law equally to all taxpayers would have beneficial application to each of the States which has a constitutional or statutory command of assessment of all property at its true or actual value.

II.

Ohio has denied petitioner equal protection of the laws by refusing to allow petitioner the same reduction from market value for the tax assessment of its personal property as the State uniformly allows owners of real property.

A. The Ohio Legislature Put Real and Personal Property into a Single Class by the Use of the Identical Standard for Assessment—"True Value in Money."

30. Bowers, *op. cit. supra*, note 17, Appendix E, *infra*, at p. 60:

> "If Ohio manufacturers were to now receive the same preferential treatment that was intended and granted by the legislature in 1931, the personal property of manufacturers should now be listed at 25 per cent of its true value."

Title 57 of the Ohio Revised Code includes all provisions relating to the imposition, assessment and collection of taxes by the State. This title is broken down into chapters among which are Chapter 5711 relating to Listing of Personal Property and Chapter 5713 relating to the Assessment of Real Property. The assessment of personal property is supervised by the State Tax Commissioner, an appointed official having state-wide responsibility, whereas real property is assessed by the 88 county auditors in Ohio. Neither the existence of separate chapters nor the division of administrative duties between the Tax Commissioner in the case of personal property and county auditors in the case of real property has any significance to the issue involved here. See *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U. S. 499, 511-12, 514 (1917); *City Ry. Co.* v. *Beard*, 293 Fed. 448, 453 (S.D. Ohio 1923). The pertinent statutory provisions are the following:

1. *Real Property.*

> "Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in his county for purposes of taxation . . ."
>
> *"The auditor shall assess all the real estate situated in the county at its true value in money."* (Emphasis added) (Ohio Revised Code §5713.01).

2. *Personal Property.*

> "Except as otherwise provided, personal property shall be listed and assessed at seventy percent of its *true value in money* . . ."
>
> • • • • •
>
> "Personal property, used in business, shall be listed and assessed at fifty percent of its *true value in*

money . . ." (Emphasis added) Ohio Revised Code §5711.22).

Thus, the basic standard for assessment in both instances is the same—true value in money.

It will be noted that the *final* tax assessment for personal property is determined by applying a statutory fraction—70% or 50%—to the true value of the property. On the other hand, the corresponding statute relating to real property *requires* a 100% assessment. However, the basic standard for assessment is the same in both cases. Thus, by the concurrent use of the same standard, it was the clear intention of the Legislature to place real and personal property on an equal footing at the initial stage of assessment in that a determination of true or actual value of both forms of property was required. In the case of real estate, no further computation was required and it was to be taxed on 100% of its actual value. In the case of personal property a second stage computation was required to arrive at the taxable portion of the true value. The ultimate irony in the assessor's illegal undervaluation of real estate is that it completely reverses the Legislature's intention. That is, instead of personal property bearing a lesser ultimate tax burden in relation to real property, the opposite result follows when the real estate is arbitrarily assessed at only 40% of its true value.

B. Ohio Grants a Tax Reduction to Owners of Real Property in the Form of Systematic Undervaluation Which is Denied to Owners of Personal Property.

In the proceedings below, the State never denied that it is a universal practice in all Ohio counties for the auditors to assess real property at only a fraction of its actual or true value in money. The studies carried out by the Ohio taxing authorities, which are part of the record of this

case (R. 71-73), and the testimony of the Chief of the Division of County Affairs of the Board of Tax Appeals (R. 46-53) substantiate what is common knowledge in Ohio, namely, that real property was assessed for tax purposes for the tax year 1963 at approximately 40% of its actual value. The practice is deliberate, systematic and approved by the Ohio tax authorities. Even the Ohio Supreme Court has recognized the practice. *Park Investment Co.* v. *Board of Tax Appeals, supra,* p. 6.

C. The Intentional and Systematic Undervaluation of Real Property While Denying a Corresponding Reduction to the Assessment of Petitioner's Personal Property Constitutes a Denial of Equal Protection of the Laws.

On nearly identical facts, the highest court of Maryland held that the State's deviation from a common standard of "full cash value" in the case of assessment of real estate constituted discrimination against personal property owners and, relying upon this Court's decision in *Hillsborough* v. *Cromwell,* 326 U. S. 620 (1946), the Maryland Court held that the complainant was entitled to the same relief sought by this petitioner. *Sears Roebuck & Co.* v. *State Tax Comm'n.,* 214 Md. 550, 136 A. 2d 567 (1957). See also *Switz* v. *Middletown Twp.,* 23 N. J. 580, 130 A. 2d 15 (1957); *Pierce* v. *Green,* 229 Iowa 22, 294 N.W. 237 (1940); *Montgomery Ward & Co. Inc.* v. *Pima County,* P-H Arizona State and Local Taxes ¶ 34,096 (Ariz. Sup. Ct., August 2, 1950). The Ohio Court was simply unwilling to recognize and to correct the same obvious discrimination.

Petitioner has previously shown: (1) that the Legislature placed real and personal property into a single class for the purpose of assessment by the use of the same statutory standard—true value in money; and (2) that the owners of real property have received the benefit of a non-legal

but systematic and deliberate practice of undervaluation which has been denied to petitioner and other owners of personal property.

The conclusion that Ohio has discriminated against petitioner in contravention of the Fourteenth Amendment follows of necessity. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886). This is not a case of sporadic undervaluation. It is the classic situation which this Court has expressly condemned:

> "It is established that the intentional systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional rights of one taxed upon the full value of his property." (*Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 28 (1931).[31]

D. The Ohio Court Decided a Collateral Issue, But By-passed the Crucial Constitutional Question.

From the opinion of the Ohio Supreme Court it might be assumed that the issue involved the power of the Legislature to classify real and personal property separately for tax purposes. Not unexpectedly, the Court held that the Legislature has such power. Thus, the Court's straw man was erected and demolished in a few short pages.

Petitioner never contested the *power* of the Legislature to classify real and personal property differently for purposes of assessment. But since 1931, when the Legislature acquired this power by amendment to the State Con-

31. There are numerous similar cases, *e.g.*, *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907); *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441 (1923); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U. S. 499 (1917); *Shoppers' World Inc.* v. *Board of Assessors*, 348 Mass. 366, 203 N.E. 2d 811 (1965); *Bettigole* v. *Assessors of Springfield*, 343 Mass. 223, 178 N.E. 2d 10 (1961); *Hamm* v. *State*, 255 Minn. 64, 95 N.W. 2d 649 (1959).

stitution (Art. XII, Section 2),[32] the Legislature failed to exercise the power insofar as the types of property involved here were concerned except for the brief employment of "taxable value" as the standard for assessment of real property during the years 1957-1959, after which the Legislature reverted to the standard of true value in money.[33] Instead, the Legislature chose to maintain a common class including both real and personal property by retaining the same standard for assessment—true or actual value in money—which had existed prior to the 1931 constitutional amendment. Prior to the 1931 amendment, the very issue raised by this petitioner had been decided in favor of the owners of personal property who complained of undervaluation of real property. *City Ry. Co.* v. *Beard,* 283 Fed. 313, 293 Fed. 448 (S.D. Ohio 1923). Since the Legislature failed to authorize the assessment of real property at less than actual value for the year in question and employed the same basic unit for assessment of real and personal property, the 1931 amendment is totally irrelevant. The amendment did not purport

32. Prior to the 1931 amendment the Ohio Constitution required all property to be taxed uniformly and the Legislature was without power to grant exemptions. The 1931 amendment retained the requirement of the uniformity as to real property only. According to the Ohio Supreme Court, the Legislature thereby acquired the power to classify and exempt personal property non-uniformly, subject to the requirements of Equal Protection of the Laws. *State ex rel. Struble* v. *Davis,* 132 Ohio St. 555, 9 N.E. 2d 684 (1937).

33. As indicated in note 3, *supra,* changes in the statutes have been made since this case arose. By 1965 amendments, real property is to be assessed at "taxable value" which will not exceed 50% of "true value in money." The application and effect of these amendments are not in issue here. It is not clear at this point whether they are an attempt to classify property and prescribe new standards of valuation, although at first impression those standards seem to be unchanged. The amendments appear to be a tacit admission by the Legislature that the Supreme Court of Ohio was wrong in the instant case.

to authorize county auditors to substitute their judgment for that of the Legislature and to make their assessments contrary to the clear mandate of the controlling statutes.

It is probable that the State will make the same contention in opposition to this petition—that the Legislature has the power to classify real and personal property separately. Petitioner concedes this, but *it is not what the Legislature could do but what it has done that is determinative.*

The opinion of the Ohio Supreme Court assumes that personal property and real property fall into different classes (Appendix A, *infra,* p. 31). The Court relied upon the Legislature's potential but unexercised power. This is not an interpretation of State law, but only an unsupportable assumption that the grant of constitutional authority to classify automatically results in classification. This assumption is not binding on this Court. See *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292 (1917); *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346 (1922); *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 83-84 (1946); *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 121-22 (1954).

The reasons which prompted the lower court to avoid the real issue before it are perhaps of only slight relevancy, but whatever they were, the Supreme Court of Ohio tried to take the easy way out rather than face the "grass-root" consequences.[34] If it had faced the issue squarely we submit that a decision in petitioner's favor would have been required.

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34. Amici advised the lower court that a decision for the plaintiff would result in a "disastrous loss of tax revenues" and ultimately in a "disaster for the whole state." Newspapers, quoting state, county, and municipal officials predicted huge revenue losses in "a deluge of publicity." *Cf. Sheppard* v. *Maxwell,* 384 U. S. 333 (1966).

E. Petitioner's Relief Lies in Reduction of the Assessment of Its Taxable Personal Property to a Level which Corresponds to the Percentage of True Value at Which Real Property is Assessed.

The discriminatory treatment accorded to petitioner does not result from the assessment of its property in excess of its true value, but rather from the failure of county auditors to comply with their statutory duty to assess real property at its true value. It is clear that under these circumstances, petitioner's relief consists of a reduction in the assessment of its personal property even though this will necessitate a departure from the statutory standards for assessment of personal property. This Court has expressly held taxpayers similarly situated to petitioner are entitled to this form of relief even though a departure from the State's statutory requirements is involved. *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 446 (1923). See also *Taylor* v. *Louisville & Nashville Railroad Co.,* 88 Fed. 350, 366 (6th Cir. 1898), *cert. den.* 172 U. S. 647 (1898); *Shoppers' World Inc.* v. *Board of Assessors,* 348 Mass. 366, 203 N.E. 2d 811 (1965); *Chicago & N.W. Ry. Co.* v. *Iowa State Taxing Com'n.,* 137 N.W. 2d 246 (Sup. Ct. Iowa 1965).

Conclusion

The same court whose decision is the subject of this appeal once said:[35]

> "Taxes, always obnoxious, become abhorrent where uniformity of assessment is lacking".

35. *Carney* v. *Board of Tax Appeals,* 169 Ohio St. 445, 160 N.E. 2d 275, 281 (1959). Opinion by Judge John W. Peck, now a member of the U. S. Court of Appeals for the Sixth Circuit.

For the reasons stated, it is urged that this Petition for Certiorari should be granted.

Respectfully submitted,

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September 7, 1966

APPENDIX A

Opinion of Supreme Court of Ohio

CONTINENTAL CAN CO., INC., APPELLANT, v. DONAHUE, TAX COMMR., ET AL., APPELLEES.

(No. 39626—Decided March 16, 1966.)

Syllabus by the Court

1. Personal property may be classified for purposes of taxation. Such classification must be reasonable and not arbitrary.
2. Where personal property has been properly classified for tax purposes, all such property *in the same class* must be assessed and taxed in the same manner.
3. The fact that *tangible personal property* is valued for tax purposes at full "true value in money," pursuant to Section 5711.22, Revised Code, whereas *real property* in the state is customarily assessed at a percentage of the statutorily required "true value in money" valuation, as provided for by Section 5713.01, Revised Code, can not be made the basis for a valid claim for a tax reduction by the owner of tangible personal property upon the ground that this constitutes a violation of the Fourteenth Amendment to the United States Constitution or Section 2 of Article I or Section 2 of Article XII of the Ohio Constitution.

APPEAL from the Board of Tax Appeals.

The facts in this case were stipulated before the Board of Tax Appeals.

As of the tax listing date for 1963, appellant owned taxable personal property consisting of machinery and equipment, inventory, furniture and fixtures in 28 counties of

Ohio. This property had a total "true value in money" of $21,702,516.

When appellant filed its 1963 intercounty personal property tax return, it claimed that its tangible personal property should be valued at approximately 40% of its "true value in money" instead of at its full "true value in money." This claim was disallowed by the Tax Commissioner, who determined that the proper basic valuation of appellant's property was its "true value in money."

The Tax Commissioner then applied the appropriate percentages prescribed by Section 5711.22, Revised Code, to determine a total taxable value of $10,916,170 for appellant's personal property for 1963.

From this determination, an appeal was taken by the taxpayer to the Board of Tax Appeals.

The evidence before the Board of Tax Appeals, in addition to the stipulation of the sales ratio studies showing the relationship between the assessed value and the sales price of real property within the 88 counties of Ohio for a particular year, included the testimony of Edwin Ducey, Chief of the Division of County Affairs of the Department of Taxation, concerning the sales ratio studies.

The Board of Tax Appeals ruled, over the objection of the Tax Commissioner, that the studies and Ducey's testimony should be admitted, but held that they were "not pertinent."

The Board of Tax Appeals, on May 19, 1965, affirmed the order of the Tax Commissioner disallowing the taxpayer's claim.

This cause is before this court upon an appeal from the Board of Tax Appeals.

Appendix A

Messrs. Taft, Stettinius & Hollister, Mr. Donald C. Alexander and *Mr. Thomas S. Shore, Jr.*, for appellant.

Mr. William B. Saxbe, attorney general, and *Mr. Edgar L. Lindley*, for appellee Tax Commissioner of Ohio.

O'NEILL, J. Appellant contends that because it has become customary, on the part of county auditors in Ohio, to assess real property at a percentage of its true value in money, whereas appellant's tangible personal property was valued by the Tax Commissioner at its full true value in money, the appellant has been denied its constitutional right of equal protection of the laws required by the Fourteenth Amendment to the United States Constitution.

Appellant contends further that Section 2 of Article XII of the Ohio Constitution requires the use of the same percentage of full "true value in money" in arriving at the basic assessed valuation of real and personal property.

Section 5711.22, Revised Code, classifies personal property for taxation purposes and, as it existed at the time of the filing of this claim, provided, in pertinent part, as follows:

"Except as otherwise provided, personal property shall be listed and assessed at 70 per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated on the average basis. • • •

"• • •

"Personal property, used in business, shall be listed and assessed at 50 per cent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis • • •."

Appendix A

Section 5713.01, Revised Code, as it existed at the time of the filing of this claim, provided, in pertinent part, as follows:

"The auditor shall assess all the real estate situated in the county at its true value in money. • • •"

This section was amended, effective November 5, 1965, to require the county auditor to assess real estate at its taxable value, which is defined in Section 5715.01 as not more than 50% of its true value in money.

It is well settled in this state that under Section 2 of Article XII of the Ohio Constitution only real property is required to be taxed according to uniform rule. The General Assembly may, for purposes of taxation, classify personal property and may tax it in a manner different from real property. *State, ex rel. Struble* v. *Davis et al., Tax Comm.*, 132 Ohio St. 555; *Zangerle, Aud.*, v. *Republic Steel Corp.*, 144 Ohio St. 529; *Ohio Oil Co.* v. *Conway, Supervisor*, 281 U. S. 146, 159. The power of the state to classify personal preperty which it may tax is limited only by the requirement that the classification be reasonable and not arbitrary. It must be related to some legitimate objective and must not discriminate against members of the same class. In *State Board of Tax Commrs. of Indiana* v. *Jackson*, 283 U. S. 527, 537, it is said:

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction • • • or if any state of facts reasonably can be conceived to sustain it." See, also, *Carmichael, Atty. Genl.*, v. *Southern Coal & Coke Co.*, 301 U. S. 495.

Thus, as long as the law under which the tax is levied operates equally upon all those within a particular class, there is no denial of equal protection of the laws.

Appendix A

Appellant does not contend that other owners of similar tangible personal property do not bear a tax burden equal to its burden, but rather it claims that owners of real property, which is a different class of property, bear a lesser tax burden than that provided by the statute and that this denies to the owner of personal property the preference which the law intended and thus there is an unlawful discrimination against the appellant.

It bases this contention upon the ground that county auditors customarily assess real property at a percentage of its actual "true value in money" rather than at its full "true value in money" as provided in Section 5713.01, *supra,* whereas the Tax Commissioner values tangible personal property at its full "true value in money" pursuant to the provisions of Section 5711.22, *supra.*

This court in *State, ex rel. Park Investment Co.* v. *Board of Tax Appeals,* 175 Ohio St. 410, says, at page 413:

> "* * * It is and has been the practice in this state for taxation purposes to establish an assessed value of less than actual value, in other words to assess [real] property for taxation only for a percentage of the actual value. *This raises the question of uniformity.*" (Emphasis added.)

In the *Park Investment* case, *supra,* the court did not pass upon the validity of the practice of undervaluation of real estate by county auditors except so far as that practice caused an unequal tax burden upon taxpayers within the same class. The complaint there was not that the property in question was assessed at a figure lower than market value, but that it was assessed at a percentage of true value in money higher than that at which

other comparable real property was assessed, and, therefore, such assessment was discriminatory and in violation of the equal protection clause of the United States Constitution.

The propriety of the Tax Commissioner valuing tangible personal property at its "true value in money" for purposes of taxation is not affected by what county auditors do with regard to the valuation of real property for tax purposes. As long as appellant bears a burden equal to that of all taxpayers similarly situated, and as long as the appellant's property is taxed and assessed in the same manner as the property of other taxpayers in the same class, and as long as the tax classification in which appellant's property is placed is not unreasonable or arbitrary, there is neither a violation of appellant's right to the equal protection of the laws under the Constitutions of the United States and Ohio, nor is there a violation of Section 2 of Article XII of the Ohio Constitution.

The decision of the Board of Tax Appeals is neither unreasonable nor unlawful and is, therefore, affirmed.

Decision affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, HERBERT, BRENNEMAN and BROWN, JJ., concur.

BRENNEMAN, J., of the Ninth Appellate District, sitting for SCHNEIDER, J.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

1966 TERM

To wit: Wednesday, March 16, 1966

CONTINENTAL CAN CO., INC.,
Appellant,
v.
GERALD A. DONAHUE, TAX COMMR., ETC., *et al.,*
Appellees.

No. 39626
Appeal from the Board of Tax Appeals

This cause, here on appeal from the Board of Tax Appeals, was heard in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is affirmed for the reasons stated in the opinion herein.

It is ordered that an entry issue to the Board of Tax Appeals to carry this judgment into execution.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 23rd day of August, 1966.

THOMAS L. STARTZMAN
Clerk

[SEAL]

SAM F. ADKINS
Deputy

APPENDIX B-1

Order Denying Rehearing

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

1966 TERM

To wit: Wednesday, April 13, 1966

CONTINENTAL CAN CO., INC., *Appellant,* *v.* GERALD A. DONAHUE, TAX COMMR., ETC., *et al.,* *Appellees.*	No. 39626 Rehearing

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 47 Page 479.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of August, 1966.

THOMAS L. STARTZMAN
Clerk.

[SEAL]

By SAM F. ADKINS
Deputy.

APPENDIX C

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION

STATE OF OHIO

CONTINENTAL CAN COMPANY, INC. 633 Third Avenue New York, New York, *Appellant,* *v.* LOUIS J. SCHNEIDER, JR., Tax Commissioner of Ohio, *Appellee.*	MAY 19 1965 Case No. 56536 (Personal Property) ENTRY

APPEARANCES:

For the Appellant—

TAFT, STETTINIUS & HOLLISTER by Donald C. Alexander, Ronald J. Coffey and Walter A. Suhre, Jr., 603 Dixie Terminal Building. Cincinnati, Ohio.

For the Appellee—

WILLIAM B. SAXBE, Ohio Attorney General by Edgar L. Lindley and Thomas J. Moyer, Assistants.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of October 19, 1964 by the appellant above

named from the following final order of the Tax Commissioner dated September 22, 1964:

"In the matter of the application of Continental Can Company, Inc., an inter-county corporation, for review and redetermination of a personal property tax assessment for the year 1963.	No. 9831 Certificate of Determination Sept. 22. 1964

"This proceeding, being the application of Continental Can Company, Inc., an inter-county corporation, for review and redetermination of a personal property tax assessment for the year 1963, after being duly heard, came on to be considered for final determination.

"The applicant, in filing its 1963 return, included therewith a claim for deduction from book value wherein the applicant sought to have its taxable tangible personal property valued for purposes of taxation at approximately 40% of its net depreciated book value, said percentage being the approximate state wide average ratio, as determined by the Ohio Board of Tax Appeals in sales ratio studies conducted by it, as between assessed valuations for real property tax purposes and market values. Said claim for deduction was disallowed and the applicant's property was assessed, as required by law, at 50% to 70% of its true value in money determined in accordance with departmental prescribed standards and methods for ascertaining true value. The applicant filed this application for review and redetermination contending that the resulting assessment was erroneous for the following reasons:

"(1) the owners of real and personal property have, for the purposes of taxation, been put into the same statutory class by the Ohio General Assembly which has used identical language, to-wit, 'true value in money' in describing the basic measure of assessment for both types of property;

"(2) being in the same statutory class, the owners of personal property, which category includes the applicant, are entitled to have their property assessed at the same percentage of full 'true value in money' as owners of real property;

"(3) the systematic practice of assessing authorities in using different percentages of full 'true value in money' in arriving at assessable valuations for real and personal property tax purposes is discriminatory and in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 2 and Article XII, Section 2 of the Ohio Constitution; and

"(4) the Tax Commissioner has the statutory power and duty to assess the applicant's personal property at the same percentage of true value (40%) that prevails in the assessment of real property.

"Being fully advised in the premises, the Tax Commissioner finds that, as an administrative official, he is obliged to presume the validity and constitutionality of statutory enactments and is without authority to pass on questions of the constitutionality thereof. *McCreary* v. *Bowers,* 106 Ohio Appeals 445; *S. S. Kresge Co.* v. *Bowers,* 170 Ohio State 405; and, *Riss & Co.* v. *Bowers,* 114 Ohio Appellate 429.

Appendix C

"Being further advised, the Tax Commissioner finds the applicant's contentions, other than those relating to constitutional issues, are not well taken and that the applicant's property has, with the exception of certain properties located in Knox and Van Wert Counties, been properly assessed in keeping with the mandates of applicable statutory provisions at the true value in money. With respect to the aforesaid property, located in Van Wert and Knox Counties, the Tax Commissioner finds that in addition to the value of taxable property assessed and here under review, the following true value should be assessed:

Schedule	Taxing District	True Value
2	Mt. Vernon Knox Co., O.	$60,540.00
2	Van Wert, Van Wert Co., O.	8,470.00

"In all other respects, the Tax Commissioner finds the assessment here under review to be proper and correct.

"Pursuant to the provisions of Section 5711.31, Revised Code, the Tax Commissioner hereby issues this certificate of determination which is his final order with regard to the assessment here under review.

"In conformity with Sections 5711.31 and 5717.02, Revised Code, upon the expiration of thirty days from the date appearing on this certificate of determination, a copy hereof will be forwarded to the Auditor of State or proper county auditor, whichever is applicable. When required by this certificate of determination such official is hereby directed to correct his records and tax lists and duplicates in

accordance herewith and a copy of such corrections will be forwarded to the applicant."

The matter was submitted to the Board of Tax Appeals on the notice of appeal, the original statutory transcript and a supplemental transcript supplied by the Tax Commissioner, a stipulation signed by counsel for the parties and filed herein on January 13, 1965 and the testimony and evidence presented at a hearing before the Board of Tax Appeals in Columbus, Ohio on January 25, 1965. The parties have also filed briefs in support of their respective positions.

The stipulation, above referred to, reads as follows:

> "It is stipulated that the following facts are true and shall be admitted by both parties for the purpose of and on the hearing of this appeal; provided, however, that other proofs as to any fact or matter involved in this appeal, not inconsistent with the statements contained in this Stipulation, may be introduced at said hearing:
>
> "1. This is an appeal from a determination of the Ohio Tax Commissioner ('Appellee'), rendered in Review and Redetermination No. 9831, denying Appellant's Claim for Deduction from Book Value included in its 1963 Personal Property Tax Return.
>
> "2. Appellant duly filed its 1963 Inter-County Personal Property Tax Return and included therein a Claim for Deduction from Book Value. Except for certain minor adjustments, said Claim was disallowed by the Tax Commissioner, and Appellant duly filed an Application for Review and Redetermination. A hearing was held at Columbus, Ohio on said Review and Redetermination, at which time Appellant introduced into evidence certain Board of Tax Appeals 'Sales

Ratio Studies'. Pursuant to agreement with the hearing examiner, Appellant later furnished the Tax Commissioner with additional 'Sales Ratio Studies' which were included as evidence in the Review and Redetermination. Thereafter, in his Certificate of Determination dated September 22, 1964, the Tax Commissioner denied Appellant's Claim for Deduction from Book Value. Appellant filed a timely Notice of Appeal from said Determination, and said appeal was docketed in the Board of Tax Appeals on October 19, 1964.

"3. During the tax period material to this appeal, Appellant owned taxable personal property, consisting of machinery and equipment, inventory, and furniture and fixtures in twenty-eight (28) counties of Ohio. Such property had, as determined in accordance with departmental prescribed standards and methods (302 Computation), a true value in money of $21,702,516.00 (before the application of statutory percentages prescribed by Ohio Revised Code Section 5711.22 but after certain adjustments approved by the Tax Commissioner). The adjusted schedules for each type of personal property are as follows:

Schedule 2 Machinery and Equipment	$13,224,242
Schedule 3 Inventory	8,153,680
Schedule 4 Furniture and Fixtures	324,595
Total True Value in Money (as adjusted)	$21,702,516

"4. Said true value in money of Appellant's personal property is the value to which was applied the appropriate percentages prescribed by Section 5711.22, Revised Code, to determine total taxable value of appellant's personal property for 1963 of $10,916,170 for all taxing districts."

Appendix C

From the record in this case it appears that the appellant filed its 1963 Inter County Corporation Return for personal property (Tax Commissioner's transcript, pages 1-46), with the Ohio Tax Commissioner (Revised Code Section 5711.13), wherein it determined and listed the market value of its tangible personal property (machinery, equipment, furniture and fixtures) used in its business and located in twenty-eight Ohio counties, by the use of the "302 Computation," which method of computation has been approved by the Supreme Court of Ohio in the case of *Wheeling Steel Corp.* v. *Evatt,* 143 Ohio St. 71. The appellant also listed the value of its manufacturing inventory on the average basis as provided by Revised Code Section 5711.16.

To illustrate the "302 Computation" we herewith set out in full that portion of appellant's tax return which is reproduced on page 6 of the Tax Commissioner's transcript:

"CONTINENTAL CAN COMPANY, INC.

1963 Ohio Inter-County Personal Property Tax Return

Cuyahoga County — Brook Park (33-52)

Machinery & Equipment—5% Rate

Year	Cost 12/31/61	Additions, Transfers In	Disposals and Transfers Out	Cost 12/31/62	Percentage Remaining Life	Market Value
1962.....		$830,884	$ 29,359	$801,525	97½	$781,487
1961.....	$124,384	30,421	122,189	32,616	92½	30,170
1960.....		26,929	4,535	22,394	87½	19,595
1955.....		861	861	0		
1944 & Prior.....		5,028	2,036	2,992	20	598
	$124,384	$894,123	$158,980	$859,527		$831,850"

Appendix C

At the time it filed its tax return the appellant also filed a claim for deduction from the depreciated book value of its tangible personal property as provided by Revised Code Section 5711.18. This claim for deduction reads as follows:

"CLAIM FOR DEDUCTION FROM
NET BOOK VALUE TO TRUE VALUE

FIRST: This claim for deduction from net book values of taxable personal property as listed in the Return filed herewith is made in order that said property be assessed at its true value in money as required by law (or at such percentage of its true value in money as provided for in Section 5711.22 of the Revised Code of Ohio). This claim is made for the reasons set forth below:

"WHEREAS, pursuant to Title 57, Revised Code of Ohio, personal property and real estate are required to be assessed for purposes of taxation on the basis of their respective true value in money; and

"WHEREAS, the assessing officials of this State and of the counties thereof have adopted the practice throughout the State of Ohio of determining that true value in money for purposes of assessment of real estate is approximately forty (40) percent of the market value of said real estate; and

"WHEREAS, the personal property listed in this return, by virtue of valuation at $22,005,626, the net book value thereof, is valued at or in excess of the market value of such property; and

"WHEREAS, the true value in money of the personal property listed in this return is, in accordance with the determination of such value as

adopted by the assessing officials of this State in assessing real property, approximately forty (40%) of the net book value thereof, or $8,438,102 (as set forth in the computations which are attached hereto and marked Exhibits 1 and 11);

"THEREFORE, the assessment of personal property on the basis of net book value for the purpose of ad valorem taxation results in unfair and unjust discrimination, denying the owner thereof of equal protection of the law in violation of the guarantees contained in the Fourteenth Amendment to the Constitution of the United States and of the protection afforded by Article 1 of the Constitution of Ohio. Accordingly, it is respectfully submitted that this claim for deduction from book value in the amount of $13,567,524 be granted, thereby relieving taxpayer from the unjust and unconstitutional discrimination complained of above.

"SECOND. In the alternative, claim is hereby made for true value of certain personal property at the Company's plants at Middletown, Zanesville and Sharonville, Ohio, to be determined in accordance with the letters of even date filed with the subject Return, copies of which are attached hereto and marked Exhibits III, IV and V."

In passing upon the appellant's tax return as filed, and upon the claim for deduction, the Tax Commissioner issued his final order which has heretofore been set out and from which the appellant has perfected its appeal to this Board as provided by Revised Code Section 5717.02.

The appellant, in its notice of appeal to this Board, says that the final order of the Tax Commissioner is erroneous in the following respects:

"3. (A) The Tax Commissioner erred in not finding that the methods used to arrive at the basic assessment value of Appellant's property (before the application of statutory percentages) were unlawful and improper for the following reasons:

"(1) The General Assembly of Ohio has prescribed the same basic measure of assessment for both real and personal property, i.e., 'true value in money.'

"(2) The taxing authorities of Ohio have adopted a systematic and intentional practice of assessing real property at a percentage of its full 'true value in money' substantially lower than the percentage of full 'true value in money' used to arrive at the basic assessment value of tangible personal property (before the application of statutory percentages).

"(3) Appellant's tangible personal property has been assessed according to said practice, which is contrary to Ohio statutory mandates and which violates the Fourteenth Amendment of the Constitution of the United States and Article I, Section 2 and Article XII, Section 2 of the Ohio Constitution.

"(B) The Tax Commissioner erred in not reducing the basic assessment value of Appellant's personal property (before the application of statutory percentages) to that percentage of full 'true value in money' used throughout the State in arriving at the assessment value of real property (approximately 40%)."

In its prayer for relief the appellant requests that the Board of Tax Appeals decide that:

"(a) The methods used to arrive at the basic assessment value of Appellant's tangible personal

property were unlawful and improper for the reasons set forth in paragraph 3(c) above.

"(b) The basic assessment value of Appellant's personal property (before the application of statutory percentages) should be reduced to that percentage of full 'true value in money' used throughout the State in arriving at the assessment value of real property (approximately 40%)."

It thus appears that appellant's tangible personal property used in its business in Ohio has been valued and listed for taxation by the Tax Commissioner as follows:

(1) Schedule	(2) Item	(3) True Value as per "302 Computation"	(4) Listing % R.C. 5711.22	(5) List Value Subject to Local Tax Rate
2	Machinery & Equipment	$13,224,242	50%	$ 6,612,120
3	Inventory	8,153,680	50%	4,076,830
4	Furniture & Fixtures	324,594	70%	227,220
	TOTALS	$21,702,516		$10,916,170

The appellant's contention is that its tangible personal property should be valued and listed for taxation as follows:

(1) Schedule	(2) Item	(3) True Value as per "302 Computation"	(4) 40% of Column (3)	(5) Listing % R.C. 5711.22
2	Machinery & Equipment	$13,224,242	$5,289,696	50%
3	Inventory	8,153,680	3,261,472	50%
4	Furniture & Fixtures	324,594	129,837	70%
	TOTALS	$21,702,516	$3,681,005	

Schedule	List Value Subject to Local Tax Rate
2	$2,644,848
3	1,630,736
4	90,885
TOTAL	$4,366,469

In other words, the Tax Commissioner has listed appellant's inventory and machinery for taxation at the statutory 50% of true value while the appellant claims that the property should be listed for taxation at 20% of true value; and the Tax Commissioner has listed appellant's furniture and fixtures for taxation at the statutory 70% of true value while the appellant claims that the property should be listed for taxation at 28% of true value.

The appellant produced no testimony or evidence at the hearing before the Board of Tax Appeals with respect to the value of its tangible personal property. Its only witness was Edwin Ducey, Chief of the County Affairs Division of the Ohio Board of Tax Appeals, and it is the order of the Board of Tax Appeals that the testimony and exhibits produced by this witness be admitted into evidence and that all objections on the part of counsel for the appellee be overruled. However, as will be noted later, the Board of Tax Appeals is of the view that all of this testimony and the exhibits produced by the witness are not pertinent to the issue which the Board of Tax Appeals has been given jurisdiction to decide in this case.

Mr. Ducey testified that the sales—assessment ratio studies prepared by his Division for use by the Board of Tax Appeals in carrying out its statutory function in equalizing *real property* values as between classes thereof in the several counties, municipalities, corporations and taxing districts (Revised Code Sections 5715.23 through .26) indicated that *real property* in Ohio, on an *average basis,* is valued and assessed for taxation at about 40% of its estimated market value.

The appellant claims that since the "true value in money" of real property, in the aggregate, is determined

by the Board of Tax Appeals to be 40% of estimated market value for real property tax equalization purposes, then the true value in money of appellant's tangible personal property, which it uses in business in Ohio, should likewise be determined by the Tax Commissioner to be 40% of its market value.

The appellant's claim, in brief, is that the term "true value in money" means exactly the same thing in the statutes providing for the valuation of "tangible personal" property for taxation as it does in the statutes providing for the valuation of "real property" for taxation.

The pertinent provisions of Revised Code Section 5713.01 read as follows:

> "Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in his county for purposes of taxation, * * *. The auditor shall assess all the real estate situated in the county at its true value in money. * * *."

The pertinent provisions of Revised Code Section 5711.22 read as follows:

> "Except as otherwise provided, personal property shall be listed and assessed at seventy percent of its true value in money * * *, * * *. Personal property, used in business, shall be listed and assessed at fifty percent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows: * * *."

The pertinent provisions of Revised Code Section 5711.18 read as follows:

> "* * *. In the case of personal property used in business, the book value thereof less book deprecia-

> tion at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from * * * depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return;* * *."

The pertinent provisions of Article XII, Section 2 of the Ohio Constitution read as follows:

> "No property, taxed according to value, shall be so taxed in excess of one percent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitations, * * *. Land and improvements thereon shall be taxed by uniform rule according to value. * * *."

It will be noted that Section 2 of Article XII of the Ohio Constitution requires that land and improvements thereon *shall* be taxed and that this class of property shall be taxed by (1) uniform rule and (2) according to value.

It might be here pointed out that there is no constitutional requirement that "real property" be valued for taxation at its "true value in money," this requirement being purely statutory. See *Carney* v. *Board of Tax Appeals,* 109 Ohio St. Reports at page 445.

It is also noted that there is no requirement in this section of the Ohio Constitution that those classes of property known as "tangible personal property" and "intangible personal property" be taxed or valued in any particular method or according to any particular rule or, that they be taxed at all. The only requirement is that

if any particular class of property is taxed according to value, it shall not be taxed in excess of one percent of its true value in money unless the electorate authorizes a higher percentage.

In the case of *State, ex rel. Struble* v. *Davis,* 132 Ohio St. 555, the Supreme Court of Ohio had this to say in the first two branches of the syllabus:

> "1. Section 2 of Article XII of the state Constitution requires only lands and improvements thereon to be taxed by uniform rule according to value. By reason of the removal of previous constitutional limitations and restrictions, the power of the General Assembly to determine the subject and methods of taxation and exemption of personal property therefrom is limited only by Article I of the Constitution of the state.
>
> "2. In the matter of classification of property for taxation purposes, broad power is conferred upon the Legislature. Its action in that regard will not be set aside by the courts unless the classification attempted results in such discrimination against members of the same class as to deny them equal protection of the law."

It is thus clear that "tangible personal property" has been classified separately and apart from real property by the Ohio Legislature and that such classification is entirely reasonable, proper and constitutional.

The appellant's whole contention is based upon the assumption that because the Legislature used the words "true value in money" in both Sections 5713.01 and 5711.22, Revised Code, the Legislature has placed both "tangible personal property" and "real property" in the same statutory class for taxation, and that the "true value

in money" thereof must be determined in the same manner.

The appellant, in part, bases its case on the decision of the Supreme Court of Ohio in the case of *State, ex rel. The Park Investment Company* v. *Board of Tax Appeals, et al.,* 175 Ohio St. Reports at pg. 410, decided January 22, 1964. As to this contention it is noted that this was a mandamus action and that the decision of the Supreme Court of Ohio merely set out the statutory duties of the Board of Tax Appeals (Revised Code Sections 5715.23, .24, .25 and .26) in connection with the annual equalization of *real property* values *in the aggregate* and had nothing whatsoever to do with "tangible personal property." It is also a matter of record that the mandate sent by the Supreme Court of Ohio to the Board of Tax Appeals was effective only for real property abstracts submitted to the Board of Tax Appeals by the several counties of Ohio for the year 1964, and thereafter.

In the case of *Western Industries, Inc.* v. *Hamilton County Board of Revision,* 170 Ohio St. Reports, 340, the Supreme Court of Ohio, in passing upon the provisions of Revised Code Section 5717.03, which section requires the Board of Tax Appeals, upon a real property valuation appeal filed with it from a decision of a county board of revision, to determine the "true value in money" of the property involved, said the following in its per curiam opinion:

> "The ultimate question to be determined by the court is whether the decision of the Board of Tax Appeals is unreasonable or unlawful.
>
> "Appellant contends that the controversy stems directly from inability to comprehend the term 'true value in money,' as the term is used in the above-

quoted portion of the statute; that the statute is unconstitutional because it has no known or ascertainable meaning; that the Board of Tax Appeals must determine the true value in money; that it abdicated its statutory duty in ruling that its duty was to determine whether appellant carried the burden; and that the valuation adopted was not the true value.

"'True value in money' is a constitutional term (Section 2, Article XII), and failure of the statute to further define the term does not render the statute so vague or indefinite as to be meaningless.

"In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property. *B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County,* 148 Ohio St. 253; *American Steel & Wire Co.* v. *Board of Revision of Cuyahoga County,* 139 Ohio St., 388.

"The burden is on the taxpayer to prove his right to a deduction. He is not entitled to the deduction claimed merely because no evidence is adduced contra his claim. *Higbee Co.* v. *Evatt, Tax Commr.,* 140 Ohio St., 325; *Rollman & Sons Co.* v. *Board of Revision of Hamilton County,* 163 Ohio St. 363.

"The decision of the Board of Tax Appeals is not unreasonable or unlawful, and is hereby affirmed."

The appellant in this case has presented nothing to indicate that its tangible personal property has been valued at more than its "true value in money" by the Tax Commissioner under the provisions of Revised Code Sections 5711.18 and 5711.22 or that its tangible personal property has been valued differently than any other tangible personal property used in business in Ohio by any

other taxpayer. Its testimony and evidence is all directed toward a different class of property, to-wit, real property, which has been valued for taxation by county auditors in Ohio under the provisions of Revised Code Section 5713.01, and under which provisions the Tax Commissioner has no jurisdiction or authority whatsoever.

We find that the Tax Commissioner valued and listed for taxation the appellant's tangible personal property as required by the provisions of Revised Code Sections 5711.18 and 5711.22 and that the tangible personal property has not been valued at more than its "true value in money," or listed for taxation at more than the statutory percentages.

Under this statement of facts it is obvious that there was no error attributable to the Tax Commissioner in the promulgation of his final order as provided by statute and therefore said final order must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

/s/ RONALD R. CALHOUN

Acting Secretary

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE*

§5701.02 Real property and land defined (GC §5322)

As used in Title LVII of the Revised Code, "real property" and "land" include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.

§5701.03 Personal property defined.

As used in Title LVII (57) of the Revised Code, "personal property" includes every tangible thing which is the

* The Sections quoted are in the form in which they existed in 1963. See Note 33 on page 22.

subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, or drawings, which are held for use and not for sale in the ordinary course of business, money, and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property as defined in section 5701.02 of the Revised Code; also every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the water within or bordering on this state whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere. The exclusion of patterns, jigs, dies, and drawings from the definition of "personal property" by this section shall not be deemed an exclusion of the value of same from taxation when such value may enter into the valuation of inventory produced for sale.

5711.22 Listing and rates of personal property tax. (GC §5388)

Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day that they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of income yield

of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either division (A) or division (B) of section 5701.06 of the Revised Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

(A) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all engines, machinery, tools, implements, and domestic animals used in agriculture, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines, machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the

kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(1) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(2) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith;

(3) Agricultural products on farms.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed.

5713.01 County auditor shall be assessor; assessment; procedure; employment and compensation of employees.

Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in his county for purposes of taxation, but this section does not affect the power conferred upon the tax commissioner as to the valuation and assessment of the property of any public utility.

Appendix D

The auditor shall assess all the real estate situated in the county at its true value in money. The auditor shall view and appraise, or cause to be viewed and appraised, each lot or parcel of real estate and the improvements located thereon at least once in each six-year period beginning with the year 1943. When the auditor so views and appraises he may enter each structure located thereon to determine by actual view what improvements have been made therein or additions made thereto since the next preceding valuation. The auditor shall revalue and assess at any time all or any part of the real estate in such county at its true value in money where he finds that the same has changed in value or is not on the tax list at its true value. He may increase or decrease the value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will place all real property on the tax list at its true value in money, or he may increase or decrease the aggregate value of the real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a percent or amount which will place such property on the tax list at its true value in money so that every class of real property shall be listed and valued for taxation by an equal and uniform rule.

When the auditor determines to assess all the real estate in the county he shall advertise the completion of his reappraisal in a newspaper of general circulation in the county once a week for three consecutive weeks next preceding the issuance of the tax bills. When the auditor reassesses a class of property or any individual parcels of real estate he shall notify the owner of the

real estate, or the person in whose name the same stands charged on the duplicate, by mail or in person, of the changes he has made in the assessments of such property. Such notice shall be given at least thirty days prior to the issuance of the tax bills. Failure to receive notice shall not invalidate any proceeding under this section.

The auditor shall make the necessary abstracts from books of his office containing descriptions of real estate in such county, together with such platbooks and lists of transfers of title to land as the auditor deems necessary in the performance of his duties in valuing such property for taxation. Such abstracts, platbooks, and lists shall be in such form and detail as the commissioner prescribes.

The auditor, with the approval of the board of tax appeals, may appoint and employ such experts, deputies, clerks, or other employees as he deems necessary to the performance of his duties as assessor; or he may enter into a contract with an individual, partnership, firm, company, or corporation to do all or any part of the work; the amount to be expended in the payment of the compensation of such employees shall be fixed by the board of county commissioners. If in the opinion of the auditor, the board of county commissioners fails to provide a sufficient amount for the compensation of such employees, he may apply to the board of tax appeals for an additional allowance, and the additional amount of compensation allowed by such board shall be certified to the board of county commissioners, and the same shall be final. The salaries and compensation of such experts, deputies, clerks, and employees shall be paid upon the warrant of the auditor out of the general fund of the county; and if the salaries and compensation are, in whole or in part

fixed by the board of tax appeals they shall constitute a charge against the county regardless of the amount of money in the county treasury levied or appropriated for such purposes.

Such experts, deputies, clerks, and other employees, in addition to their other duties, shall perform such services as the auditor directs in ascertaining such facts, description, location, character, dimensions of buildings and improvements, and other circumstances reflecting upon the value of real estate as will aid the auditor in fixing its true value. The auditor may also summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county.

APPENDIX E

REPORT TO OHIO MANUFACTURERS' ASSOCIATION
BOARD OF TRUSTEES

Wednesday, June 1, 1966, Neil House

by

Stanley J. Bowers—Taxation Counsel

The Business Tax Climate in Ohio and Future Revenue Needs

Industry in Ohio enjoys a healthy position. It has understanding public officials, both in the executive and legislative branches of our state government, who have a keen appreciation of its problems, particularly those involving taxation. This fine attitude on the part of our present officials is not only common knowledge in Ohio but is now recognized throughout the nation.

Ohio is and will continue to be an attractive state for industrial growth, if it continues at all times to have a favorable tax climate for manufacturing industries. Competition among the states for industrial development and expansion is at an all-time high. Ohio cannot afford to take second place to any other state in maintaining its present rate of industrial growth or in maintaining a favorable business tax climate.

What I have said thus far is not to be interpreted to the effect that I believe all the tax laws of Ohio are in every instance good or fair. There are situations where the burdens of taxation are excessive on manufacturers. For example, the personal property tax paid by manufacturers for local governmental purposes (primarily for schools) has been increasing annually and is now at a point where it may be retarding orderly production and

expansion in certain manufacturing businesses. Thirty-five years ago the Ohio legislature, for the purposes of encouraging industrial development in Ohio, provided by law that personal property used in manufacturing was to be assessed for taxation at 50 per cent of its true value. At that time (1931) all real property in Ohio was being assessed for taxation at approximately 80 per cent of its true value. Today real property is being assessed at approximately 40 per cent of its true value, but personal property of manufacturers is still being assessed at 50 per cent of its true value.

If Ohio manufacturers were to now receive the same preferential treatment that was intended and granted by the legislature in 1931, the personal property of manufacturers should now be listed at 25 per cent of its true value.

For the current tax year 1966, the personal property tax will produce approximately $280 million to local governments in Ohio. Manufacturers will pay approximately 75 per cent of this total, or $210 million. The most burdensome, and in many cases the most inequitable, tax imposed on manufacturers in Ohio is the tax on their personal property. It would appear that a reduction in the percentage at which personal property of manufacturers is assessed for taxation is excessive and is due for a change.

Time does not permit me to discuss other aspects of our tax laws relating to our state and local tax system that may be detrimental to industrial development and expansion in Ohio. The Ohio Tax Study Commission is now in the process of reviewing the tax structure of this state, and it is anticipated that they will consider the major inequities that now exist under our tax laws. It is hoped

that the Study Commission's report, to be submitted to the next General Assembly, will contain recommendations that would, if enacted by the legislature, encourage greater industrial growth within our state.

My principal assignment here today is to review briefly what is ahead for the next General Assembly, primarily as to the revenue needs for our state and local governments.

The close of the state's current fiscal year, ending June 30, is just 29 days away. It is anticipated that the state will end the fiscal year with a modest surplus (perhaps $30 million). This has been done without new or increased taxes and is a real accomplishment for which Governor Rhodes and Finance Director Richard Krabach can be justly proud.

The Governor's ability during the last legislative session to keep his budget in balance with estimated tax receipts during this biennium was only possible through the assistance he received from a majority of his party members in the legislature. In each legislative session, requests coupled with pressures constantly increase for more and more spending at the state and local levels, especially in the areas of education and welfare. Only when these requests are carefully examined and studied by the members of the General Assembly, working in cooperation with the Governor, can we expect to have economical, efficient and responsible government in Ohio. We can reasonably anticipate at this time that the state's budget for the last year of the current biennium, ending June 30, 1967, should fare as well as has been our experience during the first year of the current biennium, which

ends June 30, 1966, provided, of course, that there are no major changes in our over-all state and national economy during the next 12 months.

Today our real concern must be directed to Ohio's next biennial budget for the fiscal years 1967-68 and 1968-69, which will be adopted by the newly elected 107th General Assembly, that takes office in January, 1967. The makers of our next state biennial budget will face the best organized groups, pressing for worthy causes, that we will have ever seen. In the main, these groups will be asking for larger appropriations for our university, welfare and school foundation programs. There is no doubt that appropriations for these needed programs will again be increased. The important question to be decided will be—how much? If the present tax sources of the state general revenue fund are to provide the wherewithal for these programs, any increase in appropriations will, of necessity, have to be extremely modest—probably not more than 4 to 5 per cent. This is about the rate our state general revenue receipts have increased in recent years during an unprecedented state and national economy.

If Ohio is not to have new or increased taxes at the state level during the next biennium, the responsibility for holding the line will rest with the next Governor of Ohio and the members of the next General Assembly, who will support such a stand. While certain expenditures by the state have increased rather gradually and uniformly over the past years and can be reasonably estimated for the immediate future, such is not the case as to expenditures for higher education in our state universities and for the revenue requirements under our school foundation program.

Appendix E

I am not a seer, but it is certain that the requests for additional appropriations for higher education, welfare and for the school foundation program for the next biennium will be far greater than the estimated general revenue receipts that will be available for such purposes from our present tax sources. While financing higher education, welfare costs and the school foundation program during the past few years has been difficult, this undertaking during the years ahead will be doubly difficult if there are to be no new or increased taxes at the state level.

To meet the fiscal problems that will face our next Governor and the members of the next General Assembly, every voter in Ohio must make certain that our officials elected in November will not only maintain but will improve our favorable business tax climate. No one can dispute the fact that the general welfare and the welfare of every group in Ohio depends on the encouragement of industrial growth in our state.

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No. 535

IN THE

Supreme Court of the United States

October Term, 1966

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

vs.

GERALD A. DONAHUE,
Tax Commissioner of the State of Ohio, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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The Petition for Writ of Certiorari filed in this matter does not contain a bona fide statement of grounds for invoking the jurisdiction of this Court nor a bona fide reason for granting the writ requested. The instant case does not involve a federal question.

A state may tax real and personal property in a different manner. Such action does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, at page 237, 33 L. Ed. 892, at page 895; *Ohio Oil Co. v. Conway*, 281 U.S. 146, at page 159, 74 L. Ed. 775, at page 782.

The petitioner admits that the Ohio legislature has the power, under the Ohio Constitution as amended in 1931, to classify real and personal property separately for purposes of taxation, see petition page 23. The petitioner denies that the Ohio legislature has exercised that power. The question of whether the Ohio legislature has enacted

statutes classifying real and personal property separately for purposes of taxation is a matter of state law for interpretation by state courts, and upon which state interpretations should be applied by the federal courts, *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487; *Bell's Gap Railroad Co. v. Pennsylvania, supra*; see also Title 28, Section 1652, U.S.C.A.

The Ohio legislature has separately classified personal property for purposes of taxation. In *Standard Oil Co. v. Zangerle*, 133 Ohio St. 33, 11 N.E. 2d 242 (1937), the Ohio Supreme Court said at page 35 of the official report:

> "• • • under the Intangible Tax Act (Section 5320 *et seq.*, General Code, 114 Ohio Laws, 714) *tangible personal property is classified* and different rates prescribed for different classifications, • • •"
>
> (Emphasis added.)

In *Zangerle v. Standard Oil Co.*, 144 Ohio St. 506, 60 N.E. 2d 52 (1945), the Ohio Supreme Court said at pages 511 and 512 of the official report:

> "Whether property was classified for taxation purposes either as land and improvements thereon, or as personal property, was immaterial and of no consequence prior to 1931, because under Section 2, Article XII of the Constitution, all property was then taxed at a uniform rate and at its true value in money. However, in 1931, that section of the Constitution was amended so as to provide that *lands and improvements thereon* shall be taxed by uniform rule according to value. By that amendment the former limitation of uniformity, as applied to the taxation of personal property, was removed. *The General Assembly, pursuant to this constitutional amendment, in the same year adopted a classified property tax law* including therein Section 5388, General Code (115 Ohio Laws, 564), which provides that, *excepting as otherwise provided*, personal property shall be listed and assessed at 70 per cent of the true value thereof in money. One of the exceptions to the general personal property classification for tax purposes above noted is that all

> engines, machinery, tools and implements of a manufacturer, of every kind and description, used or designed to be used in refining or manufacturing, except such as are legally regarded as improvements on land and so considered in arriving at the value of real property assessed for taxation, and except such as are used for the generation or distribution of electricity other than for the use of the person generating or distributing the same, shall be listed and assessed for taxation at 50 per cent of the true value thereof in money. * * *" (Second emphasis added.)

See also, *State, ex rel. Struble, v. Davis*, 132 Ohio St. 555, 9 N.E. 2d 684 (1937); and *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 60 N.E. 2d 170 (1945).

The petitioner's whole contention is based upon the naked assertion that because the words "true value in money" appear in both Sections 5713.01 and 5711.22, Onio Revised Code, the legislature of Ohio has placed real and personal property in the same statutory class for taxation. That said words are not words of classification is amply demonstrated by the cases cited *supra*. The petitioner fails to distinguish between classification of property for taxation and the determination of the tax on property in a class. There can be no doubt that in Ohio tangible personal property has been classified separately and apart from real estate, for purposes of taxation, and that such a classification is entirely reasonable and proper.

At page 20 of its petition the petitioner cites and relies upon *Sears, Roebuck & Company v. State Tax Commission of Maryland*, 214 Md. 550, 136 A. 2d 567. That case turned upon Maryland statutory law, not upon the equal protection clause of either their state or the federal constitution, *National Can Corporation v. State Tax Commission of Maryland*, 220 Md. 418, 153 A. 2d 287. By the time of the latter case, which was decided two years after the *Sears, Roebuck & Company* case, *supra*, Maryland had both the

constitutional provision permitting classification (as Ohio has had since 1931) and the implementing legislation (as Ohio has had since 1931) and the second, third and fourth holdings thereof are summarized as follows:

> 2. "The Equal Protection Clause of the Fourteenth Amendment does not prevent state from making reasonable classification for tax purposes and taxing different classes differently. U.S.C.A. Const. Amend. 14."
>
> 3. "Equality within a class is essential under Equal Protection Clause, but equality between different classes is not required. U.S.C.A. Const. Amend. 14."
>
> 4. "Real property and personal property may be differently taxed without violation of Equal Protection Clause. U.S.C.A. Const. Amend. 14."

On February 23, 1960, the Supreme Court of the United States dismissed an appeal of said case for want of a substantial federal question, *National Can Corporation v. State Tax Commission of Maryland*, 361 U.S. 534, 4 L. Ed. 2d 538, 80 S. Ct. 586.

From the authorities cited it is apparent that the Equal Protection Clause of the Fourteenth Amendment is satisfied so long as there is no discrimination between members of the same constitutional class. The record in this case is totally devoid of any showing by the petitioner of any unequal treatment within its constitutional class.

The petitioner's suggestion that this Court should seize upon the instant case as a "vehicle" (see page 16 of the petition) to express itself upon such reprehensible things as bribery (see petitioner's reference to the California Tax Scandal, page 16 of the petition), inadequacy of legal remedies (see page 15 of the petition), racial discrimination (see pages 16 and 14 of the petition), and the effect of "a deluge of publicity" (see page 23 of the petition) is not well founded. The record in this case contains no indication that such matters are involved here.

The requested Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

/s/ .....
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